Supreme Court, U.S.
FILED

981076 JAN 4 - 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

PORTLAND 76 AUTO/TRUCK PLAZA, INC.,

Petitioner,

v.

UNION OIL COMPANY OF CALIFORNIA, dba UNOCAL,
NATIONAL AUTO/TRUCKSTOPS, INC.

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Bruce M. Hall*
John J. Dunbar
Sarah J. Ryan
BALL JANIK LLP
101 S.W. Main, Suite 1100
Portland, OR 97204
Telephone: (503) 228-2525
Counsel for Petitioner
Portland 76 Auto/Truck Plaza, Inc.
**Counsel of Record for Petitioner*

December 30, 1998

33pp

QUESTIONS PRESENTED

Section 2(e) of the Robinson-Patman Act prohibits a wholesaler from discriminating in favor of one reseller over another in the furnishing of "services or facilities connected with the processing, handling, sale or offering for sale of [a] commodity." A jury found in favor of petitioner, a diesel fuel reseller, on petitioner's claim that respondent had discriminated against petitioner by failing to provide petitioner with facilities on proportionally equal terms to those facilities afforded to similarly situated resellers. The questions presented are:

1. Whether, under the plain meaning of section 2(e) of the Robinson-Patman Act, facilities that are provided to promote the resale of a commodity are "facilities" as that word is used in section 2(e) of the Robinson-Patman Act if those facilities are located on leased property?

2. Whether a judicially created exception to section 2(e) of the Robinson-Patman Act exists for franchisors and other wholesalers of commodities otherwise subject to the Robinson-Patman Act, simply because the franchisor's or wholesaler's commodities are sold on property leased by the franchisee-reseller?

LIST OF PARTIES AND AFFILIATES

The parties listed on the caption were the only parties to the proceedings before the Ninth Circuit Court of Appeals. At trial, Portland 76 Auto/Truck Plaza, Inc. ("Portland 76") and defendant National Auto Truckstops, Inc. ("National") stipulated to a judgment dismissing Portland 76's breach of lease claim against National. National is not a subject of the present petition.

Pursuant to Supreme Court Rule 29.1, Portland 76 declares that it has no parent or subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND AFFILIATES ii

TABLE OF CONTENTS iii

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414 (CA 11 1990) 22,24,25

Chroma Lighting v. GTE Products Corp., 111 F.3d 653 (CA 9), *cert. denied*, ____ U.S. ____, 118 S. Ct. 357 (1997) 25

Connecticut Nat. Bank v. Germain, 503 U.S. 249 (1992) 8,9

Conroy v. Aniskoff, 507 U.S. 511 (1993) 16

Dantzler v. Dictograph Productions, Inc., 272 F.2d 172 (CA 4 1959) 22

Export Liquor Sales, Inc. v. Ammex Warehouse Company, 426 F.2d 251 (CA 6 1970), *cert. denied*, 400 U.S. 1000 (1971) 12,13

F.T.C. v. Fred Meyer, Inc., 390 U.S. 341 (1968) 18,21,23

F.T.C. v. Simplicity Pattern Co., 360 U.S. 55 (1959) 13,17,18,26

Falls City Industries v. Vanco Beverage, 460 U.S. 428 (1983) 18,24

Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) 8

George Haug v. Rolls Royce Motor Cars, 148 F.3d 136 (CA 2 1998) 20,21

Hinkleman v. Shell Oil Co., 962 F.2d 372 (CA 4), *cert. denied*, 506 U.S. 1041 (1992) 13,14

J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524 (CA 3 1990), *cert. denied*, 499 U.S. 921 (1991) 25

Pavelic & LeFlore v. Marvel Entertainment, 493 U.S. 120 (1989) 8,9,11

Pennsylvania Department of Corrections v. Yeskey, ___ U.S. ___, 118 S. Ct. 1952 (1998) 10

Perkins v. Standard Oil Company of California, 395 U.S. 642 (1969) 20,21,22,23

Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421 (CA 9), *cert. denied*, 516 U.S. 987 (1995) 25

Rubin v. United States, 449 U.S. 424 (1981) 8

Standard Oil Company of California v. Perkins, 396 F.2d 809 (CA 9 1968), *reversed on other grounds*, 395 U.S. 642 (1969) 20

STATUTES

15 U.S.C. § 13(a) (Section 2(a) of the Robinson-Patman Act) 7,8,21

15 U.S.C. § 13(b) (Section 2(b) of the Robinson-Patman Act) 24,26

15 U.S.C. § 13(c) 8

15 U.S.C. § 13(d) (Section 2(d) of the Robinson-Patman Act) 8,18,21,26

15 U.S.C. § 13(e) (Section 2(e) of the Robinson-Patman Act) ..... *passim*

15 U.S.C. § 15 3

28 U.S.C. § 1254(1) 2

MISCELLANEOUS

Webster's New International Dictionary (second edition 1943) 10

Webster's Third New International Dictionary (unabridged edition 1993) 10

In The

Supreme Court of the United States

October Term, 1998

PORTLAND 76 AUTO/TRUCK PLAZA, INC.,

Petitioner,

v.

UNION OIL COMPANY OF CALIFORNIA, dba UNOCAL, NATIONAL AUTO/TRUCKSTOP, INC.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Portland 76 Auto/Truck Plaza, Inc. respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-23) is reported at 153 F.3d 938 (CA 9 1998). The decisions of the lower court from which the appeal is taken (App. 26-32, App. 43-44) are unreported.

JURISDICTION

A timely petition for rehearing and suggestion of rehearing en banc was denied on October 7, 1998 (App. 24-25). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is 15 U.S.C. § 13(e), which is reproduced at App. 53-54.

STATEMENT OF THE CASE

Petitioner, Portland 76 Auto/Truckstop Plaza, Inc. ("Portland 76"), had an agreement with respondent, Union Oil Company of California ("Unocal"), to purchase diesel fuel from Unocal for resale. Portland 76 eventually pursued litigation against Unocal, alleging, in part, that Unocal had violated section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e). The jury awarded $2,307,440 to Portland 76 on its Robinson-Patman Act claim. App. 34, 42. Pursuant to 15 U.S.C. § 15, that amount was trebled, to a total of $6,922,320. App. 34.

Unocal appealed the judgment on Portland 76's Robinson-Patman Act claim. The Ninth Circuit Court of Appeals, in an opinion by Circuit Judge Kleinfeld, concluded that the Robinson-Patman Act's ban on the discriminatory provision of "facilities" did not apply to "facilities" provided on leased property, and, therefore, reversed the trial court's judgment on the Robinson-Patman Act claim. App. 17. Portland 76 has filed this petition for a writ of certiorari in order to seek review of that holding.

A. Facilities In The Unocal Franchise Truckstop System

For many years, Unocal operated a franchised chain of full-service "76" truckstops across the country. Unocal full-service truckstops were designed to promote the resale of fuel to long-haul truckers. Truckers consider a full-service truckstop to be a home away from home. Facilities at a full-service truckstop -- *e.g.* restaurants, lounges, game rooms, phones, showers, laundry machines -- are intended to encourage truckers to stop and purchase fuel at that truckstop. Truckstops actively promote the sale of diesel fuel. There is a direct correlation between the quality of facilities at a Unocal truckstop and that truckstop's

fuel sales. In fact, truckstop facilities are even more important than fuel price in getting long-haul truckers to purchase fuel.

B. Portland 76's Agreements with Unocal

In 1978, Portland 76 entered into two interrelated agreements with Unocal. Under the first agreement, Unocal agreed to sell fuel to Portland 76 for resale at a truckstop. The second agreement was a lease for a Unocal brand truckstop in Aurora, Oregon. That lease specifically provided that its purpose was to allow the sale of Unocal fuel.

C. Problems with the Truckstop's Facilities

During the late 1980s, truckstop facilities across the country underwent vast improvements to promote fuel sales. During that same time, Unocal allowed Portland 76's facilities to fall far below industry standards. In 1986, after seven years of consistently profitable operations, Portland 76 began to notice that Unocal was not adequately maintaining or improving the truckstop's facilities. The problems with the facilities were numerous and had a direct impact on the promotion of fuel sales. Problems included: the lead-in sign from the highway to attract customers needed replacing; the signage on the highway was inadequate; the roof in the restaurant leaked and needed to be replaced; the heating and air-conditioning at the restaurant did not operate properly; the shower facilities lacked adequate ventilation; the parking-lot had potholes that truckers said they could "lose their trucks in" and into which truckers frequently fell; the sewage system produced a foul odor on hot days and had been cited by state authorities but was never repaired; fuel lanes were too narrow; the building needed painting; the travel store and phone room were cramped.

Portland 76's customers complained about the quality of the truckstop's facilities. Truckers began to refuse to stop at the

Portland 76 truckstop, because its facilities were viewed as dismal, run-down, lacking in key amenities, and inadequate in comparison to the facilities at other truckstops. Long-standing customers of Portland 76 stopped frequenting the truckstop. Fuel sales dropped.

D. The Discrimination in Facilities

Because big trucks have a fuel range of 1,600 to 1,800 miles, Portland 76 was competing with Unocal truck stops in Northern California. While Portland 76 struggled with its poor facilities, Unocal renovated and improved the facilities of those other Unocal truckstops. Unocal was not required under its leases with the Northern California Unocal brand truckstop operators to make facilities improvements. However, those truckstops received a variety of critical facilities designed to promote sales, such as new restaurants, travel stores, lounges, improved showers and other driver amenities. Because of the importance of such facilities to the resale of fuel, Portland 76 customers began stopping for extended fueling stops at the other Unocal truckstops -- as well as truckstops of Unocal's competitors -- in the relevant market area.

Even though the Portland 76 location had as much truck traffic as the Northern California Unocal truckstops, Unocal spent a substantially disproportionate amount of money improving the Northern California truckstops in comparison to the Portland 76 truckstop. For example, between 1987 and 1990, Unocal spent between four and six times as much money on improvements to the facilities at three Northern California truckstops than it did on the facilities at the Portland 76 truckstop. That disparity in spending led to a disparity in quality at the different Unocal truckstops. Even Unocal recognized that the Portland 76 truckstop had become "far inferior" when compared to other truckstops in the relevant market area.

Unocal's gross spending disparities damaged Portland 76 and caused Portland 76 to lose business to other competing truckstops. The jury found that Portland 76 lost over $2.3 million in business income as a result of Unocal's discrimination. App. 42. If Portland 76 had received similar facilities, its losses would have ceased and its profits would have increased dramatically.

E. The Proceedings Below

In 1992, Portland 76 brought suit against Unocal. Portland 76 alleged, in part, that Unocal had violated section 2(e) of the Robinson-Patman Act by failing to provide Portland 76 with "facilities" on "proportionally equal terms" to those facilities that had been provided to Portland 76's competitors. Relying on the plain meaning of the term "facilities," the district court denied Unocal's motions in which Unocal argued that the truckstop's facilities could not be "facilities" covered by section 2(e). App. 27, 44. The jury concluded that Unocal had violated section 2(e), and rendered a verdict accordingly. App. 41-42.

Unocal appealed the trial court's entry of the jury verdict against Unocal on the Robinson-Patman Act claim. The Ninth Circuit, by Judge Kleinfeld, reversed, holding that the truckstop facilities were not "facilities" under the Robinson-Patman Act. The Ninth Circuit recognized that the record was replete with evidence that independent facilities at the truckstop -- such as the highway signs, the roof and heating system at the restaurant, the showers, the laundry facilities, and the sewage system -- all were in disrepair. *Id.* at 4. The Ninth Circuit also recognized that those facilities were built and used primarily to promote the resale of fuel. *Id.* at 2. In fact, the Ninth Circuit explicitly recognized that Portland 76 had proven all the necessary elements of its Robinson-Patman Act claim. *Id.* at 6-7.

Nonetheless, the Ninth Circuit concluded that the truckstop itself was not a "facility" within the reach of section 2(e) of the Robinson-Patman Act, because Portland 76 leased that truckstop from Unocal. Accordingly, the Ninth Circuit believed that "facilities" at the truckstop were not "facilities" under the Robinson-Patman Act. *Id.* at 17.

The Ninth Circuit's holding contradicts the plain meaning of the Robinson-Patman Act, creates a judicially made exception to the statute, and has no basis in this Court's jurisprudence or the legislative history of the statute. The Ninth Circuit's decision, if allowed to stand, will have a broad economic impact on franchising, which has become one of the country's most popular ways of conducting business. Under the Ninth Circuit's decision, franchisors will be able to evade the Robinson-Patman Act simply by linking the provision of facilities to a lease agreement. This Court should grant this petition for a writ of certiorari in order to review the Ninth Circuit's flawed opinion.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S OPINION IGNORES THE PLAIN MEANING OF THE WORD "FACILITIES" AS THAT WORD IS USED IN THE ROBINSON-PATMAN ACT.

The Ninth Circuit concluded that the facilities at the truckstop were not "facilities" within the reach of section 2(e) of the Act, because those facilities were located on leased property. In reaching that conclusion, the Ninth Circuit ignored the plain meaning of the word "facilities."

The Robinson-Patman Act (the "Act") generally makes it unlawful for a wholesaler of a commodity to discriminate in the prices offered to different purchasers of that commodity. 15

U.S.C. § 13(a). App. 51-52. Several provisions of the Act specifically prohibit wholesalers from offering disguised discounts to purchasers of commodities. 15 U.S.C. §§ 13(c)-(e). App. 52-54. Section 2(e) prohibits disguised price discrimination though the unequal provision of "facilities" by a wholesaler to different resellers of a commodity. Section 2(e) provides:

> "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

15 U.S.C. § 13(e). App. 53.

Because the word "facilities" is not defined in the Act, the Ninth Circuit should have applied the plain meaning doctrine to interpret it. This Court repeatedly has stated that, in interpreting a statute, a court must first look to the language of the statute. *Pavelic & LeFlore v. Marvel Entertainment*, 493 U.S. 120, 123 (1989). If the language of the statute is unambiguous, a court's inquiry should proceed no further. *Id.* at 123. *See also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal cannon before all others. . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 538 (1994) (Thomas, J., concurring) ("When

the text of a statute is clear, our interpretive inquiry ends."). That rule applies even when the language of the statute leads to a result that may appear undesirable to a reviewing court. *Pavelic & LeFlore*, 493 U.S. at 126 ("Our task is to apply the text, not to improve upon it"); *Connecticut Nat. Bank*, 503 U.S. at 253-54 ("[w]e have stated time and again that a court must presume that a legislature says in a statute what it means and means in a statute what it says there").

The Ninth Circuit acknowledged that the text of the Act would lead to the conclusion that the facilities at the truckstop are "facilities" under section 2(e). App. 6. However, the Ninth Circuit disregarded the clear language of the statute and instead concluded that "facilities" on leased property were not "facilities" under the statute. In reaching that conclusion, the Ninth Circuit relied on: (1) interpretations from two other circuits (the validity of which the Ninth Circuit questioned in its opinion); (2) inapposite legislative history; and (3) a truncated reading of Federal Trade Commission ("FTC") regulations. The Ninth Circuit's analysis disregards this Court's clear instructions as to how a court should interpret a statute. The Ninth Circuit's holding -- when read in conjunction with recent opinions from the Fourth and Sixth Circuits -- serves to solidify a flawed application of the Act. A uniform rule is emerging from the Circuit Courts of Appeal that precludes any party to a lease from pursuing a claim for discrimination by a wholesaler in the provision of facilities to promote the resale of a commodity, in contravention of the clear language of the Act.

A. The Plain Meaning of the Statute Contains No Exception for "Facilities" on Leased Property.

The Ninth Circuit disregarded the plain meaning of section 2(e) of the Act when it created a "leased property" exception to section 2(e). Nothing in the text of the Act supports

the judicial creation of the Ninth Circuit's leased property exception.

Reading the word "facilities" in section 2(e) to include the facilities at the truckstop comports with the plain meaning of the word "facilities." For example, the dictionary defines a facility as "something that promotes the ease of any action, operation, transaction, or course of conduct" or "something (as a hospital, machinery, plumbing) that is built, constructed, installed or established to perform some particular function or to serve or facilitate some particular end." *Webster's Third New International Dictionary* at 812-13 (unabridged edition 1993). That definition has not changed substantively since the time Congress enacted the Act. *See Webster's New International Dictionary* at 908 (second edition 1943) (defining a facility as "[a] thing that promotes the ease of any action, operation, transaction, or course of conduct; advantage; opportunity; -- usually in pl.; as, special facilities for study").[1] Under either of those definitions, facilities on leased realty would be facilities within the reach of section 2(e) of the Act. Similarly, under either of those definitions, the truckstop itself would be a "facility." Even the Ninth Circuit acknowledged this. App. 8. The plain meaning of the statute is clear and unambiguous.

Even though the plain language of section 2(e) of the Act speaks to discrimination in the provision of "facilities," the Ninth Circuit concluded that the truckstop itself, as a whole entity, was not a "facility" under section 2(e) of the Act. Therefore, the court reasoned, the facilities at the truckstop also were not "facilities" as that term is used in section 2(e). The Ninth Circuit engaged in linguistic gymnastics in order to

---

[1] *See Pennsylvania Department of Corrections v. Yeskey*, ___ U.S. ___, ____, 118 S. Ct. 1952, 1955 (1998) (citing Webster's New International Dictionary to establish the plain meaning of a word used in a statute).

convert the *facilities* at the truckstop into the truckstop itself. All the participants in this case -- the judge, jury, litigants and Ninth Circuit -- understood the word "facilities" to refer to those facilities at the truckstop that served to promote the resale of Unocal fuel. Throughout the course of the trial, all the parties referred to the various amenities at the Aurora truckstop designed to promote the resale of fuel as "facilities." Even Unocal's internal documents called the amenities at the truckstop "facilities." The jury was instructed repeatedly to consider whether Unocal had discriminated in the furnishing of "facilities" at the Aurora truckstop. App. 45-50. Similarly, even the Ninth Circuit described those amenities as "facilities". *See* App. 3 (discussing Unocal's proposal to redesign the "shower and laundry facilities"). The Ninth Circuit's conversion of the "facilities" at the truckstop to a singular "facility" contravenes the case litigated by the parties, decided by the jury and considered by the Ninth Circuit.

The language in section 2(e) surrounding the word "facilities" similarly shows that "facilities" are vehicles that promote the sale of a commodity. *See Pavelic & LaFlore*, 493 U.S. at 123-126 (using the language surrounding an undefined term in a statute to aid in interpreting the meaning of the undefined term). "Facilities" are things that are "connected with the processing, handling, sale or offering for sale of [a] commodity" purchased from a wholesaler. 15 U.S.C. § 13(e). Facilities at a truckstop created, designed and maintained to promote the resale of fuel clearly are connected with the "sale or offering for sale of [a] commodity." Accordingly, those facilities are "facilities" as that word is used in the statute.

The Act's use of the word "purchaser" also belies the existence of the Ninth Circuit's judicially created leased property exception. Section 2(e) applies to "purchasers" of "commodities." While "purchaser" is not defined in the Act,

there is nothing in the language of the Act that limits "purchasers" to only those resellers who own the land on which they resell the commodity. As long as the "purchaser" buys the commodity from the wholesaler, the "purchaser" is protected under the Act. However, the Ninth Circuit's opinion eviscerates the class of "purchasers" who can claim protection under the Act. Under the Ninth Circuit's opinion, only those purchasers who do not lease from the wholesaler the land on which they resell the commodity are protected.

There is nothing within the language of the Robinson-Patman Act that lends support to the Ninth Circuit's holding that facilities on *leased* property somehow are excluded from the ambit of section 2(e) of the Act. The statute does not contain a "leasehold" exception. The statute gives a wholesaler no greater freedom to act because of the nature of the reseller's legal interest in the real property on which a commodity is being resold. The Act is an anti-trust statute, not a real property statute. It does not incorporate, explicitly, by reference, or even implicitly, common-law real property rules. Yet, in order to avoid the plain meaning of "facilities," the Ninth Circuit relied precisely on such rules. App. 7-8 (discussing common law treatment of leases during the time period that the Act was enacted by Congress).

B. Action by the Supreme Court Is Required to Eliminate a Non-Textual Leased Property Exception to Section 2(e) of the Robinson-Patman Act That Has Been Adopted by the Fourth, Sixth and Ninth Circuits.

The Ninth Circuit noted that two other circuits have held that "leased realty" could not constitute a "facility" as that word is used in section 2(e). The Ninth Circuit questioned the reasoning behind those two opinions, *Export Liquor Sales, Inc.*

v. Ammex Warehouse Company, 426 F.2d 251, 252 (CA 6 1970), *cert. denied*, 400 U.S. 1000 (1971) and *Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 380 (CA 4), *cert. denied*, 506 U.S. 1041 (1992). App. 9-10. The Ninth Circuit properly recognized that in *Export Liquors*, the Sixth Circuit did not explain its reason for concluding that section 2(e) of the Act contained a leased property exclusion. App. 10 ("[t]he Sixth Circuit decision does not say why leased realty is not 'facilities connected with the . . . sale . . . of such commodity,' in the sense intended by [section 2(e)]"). The Ninth Circuit also properly criticized the Fourth Circuit's analysis in *Hinkleman*. *Id.* ("[w]e are not sure of the tenability of the *Hinkleman* distinction").

In *Hinkleman*, a divided Fourth Circuit panel held that the leased premises at a gasoline station "facilitated" but did not "promote" the resale of fuel and, accordingly, were not facilities under section 2(e). 962 F.2d at 380-81.[2] The dissent in *Hinkleman* criticized the majority's conclusion that a gas station could not be considered a "facility." *Id.* at 381-84. The dissent noted that the principal purpose of the Act was to attack discrimination in advertising and promotional activities, and criticized the majority's decision to ignore this Court's instructions that courts "are not in a position to review the economic wisdom of Congress." *Id.* at 372, *quoting F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959). The dissent in *Hinkleman* recognized that the majority's narrow reading of section 2(e) "contravene[d]" the plain meaning of the Act, the legislative history of the Act, and the purpose of the Act. *Id.* at 383. The dissent observed that:

---

[2] In *Hinkleman*, the Fourth Circuit analyzed the Maryland state law analog to section 2(e) of the Act. However, both the majority and the dissent recognized that that analysis hinged on the interpretation and application of the word "facilities" as that word is used in section 2(e) of the Act.

> "Under the rationale of the majority, if Shell furnishes on unequal terms signs to be affixed to the front of its gasoline purchasers' service stations, § 2(e) is violated. But, if it furnishes the entire service station on unequal terms, § 2(e) is not violated. The violation is more egregious, rather than non-existent, in the latter instance."

Id. (Footnote omitted.) Similarly, the trial judge in this case, who had heard extensive evidence that truckstop facilities directly promote fuel sales, found that the majority decision in *Hinkleman* was confusing; even Unocal's counsel conceded that the majority's logic was "tortured."[3]

Despite its criticism of the Fourth and Sixth Circuits' opinions, the Ninth Circuit relied on the fact that those "two circuits have ruled that leased real estate cannot be 'facilities' and none have ruled that it can be." App. 10. The Ninth Circuit decided to follow those opinions and avoid an intercircuit conflict "[b]ecause of the importance of predictability to commercial relations, as well as deference to our sister circuits." *Id.*

The Ninth Circuit's approach in addressing the Fourth and Sixth Circuit opinions is flawed. The approach avoids a reasoned consideration of the issue presented in this case. The Ninth Circuit decided to follow two opinions that it explicitly recognized as being devoid of compelling reasoning in order to *avoid* a conflict between the circuits; that abdication of responsibility is both unhelpful to litigants and patently unjust.

---

[3] In this case, the evidence showed that truckstop facilities are intended to promote, and do promote, fuel sales. App. 2, 4. In *Hinkleman*, which was decided on a pre-trial motion to dismiss, that court lacked a fully developed record.

Three circuits have created an exception to the plain meaning of the text of section 2(e) of the Act. In all three cases, the legal reasoning supporting the creation of that exception is flawed. As with other judicially disfavored statutes, the circuits appear to be struggling to find a way to restrict the scope of the Act by adding exceptions to the Act that are not supported by the text of the Act.

C. The Legislative History of the Robinson-Patman Act Does Not Obfuscate the Plain Meaning of the Statute.

The Ninth Circuit also relied on inapposite legislative history to support its creation of a leased property exception to section 2(e) of the Act. The Ninth Circuit's non-persuasive reliance on that irrelevant legislative history was improper.

After the Ninth Circuit concluded that the text of the Robinson-Patman Act was ambiguous, the court turned to the legislative history of the Act to determine whether Congress intended to exclude facilities on leased property from the "facilities" covered by section 2(e). The Ninth Circuit recognized that the legislative history did not address that issue. App. 10-13. The Ninth Circuit nonetheless concluded that, because Congress did not address the issue presented by this case, the legislative history indicated a legislative intent not to treat facilities on leased premises as "facilities" covered by the Act. *See* App. 13. ("Discrimination against a franchisee as tenant by a franchisor is different from use by chain stores of their market power to force wholesalers to discriminate against small local stores.")

The problem with that approach is twofold. First, the Ninth Circuit's application of legislative history provides little, if any, useful guidance in determining whether Congress desired to *exclude* facilities on leased property from the term "facilities" in

section 2(e). The fact that Congress did not mention the nature of the property interest on which the facilities lay indicates only that Congress did not debate that topic. Silence on a topic does not indicate ambiguity, especially in the light of the clear language of the statute.

The second flaw with the Ninth Circuit's use of legislative history in this case is that the Ninth Circuit altogether fails to make even the tiniest analogy available to it from the legislative history it quotes. The Ninth Circuit read the legislative history to provide that the *only* purpose of the Act is to prevent wholesalers of products from favoring chain stores over independent stores. App. 13. It is no large stretch to conclude that the situation presented here is the modern analog to the 1930s chain store/wholesaler scenario. In this era, a franchisor/distributor frequently is the wholesaler that has the power to favor one franchisee over another. The potential harm is the same; only the players have changed slightly.

The Ninth Circuit has chosen to let the legislative history freeze the statute in the economy of the 1930s. That approach undercuts the purpose and meaning of the Act. It also illustrates the shortcomings of relying on legislative history, especially in the light of the text of the statute. *See Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("[N]ot the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.") (Emphasis in original).

D. The Regulations Promulgated by the FTC Do Not Obfuscate the Plain Meaning of the Statute.

After looking at the text of the statute, and the legislative history, the Ninth Circuit turned to regulations promulgated by

the FTC to aid that court's determination as to whether facilities on leased property constitute "facilities" as that word is used in section 2(e) of the Act. App. 13-15. The Ninth Circuit misread and misapplied those regulations.

The Ninth Circuit acknowledged that the FTC has promulgated a *non-exhaustive* list of examples of "services and facilities" as that word is used in section 2(e) of the Act. That list includes "advertising", "handbills", "cabinets", "displays" and similar manifestations of materials created or installed to promote the sale of a commodity. The panel then concluded that, because "leased realty" was not "like the things on the list", the facilities at the truckstop were not "facilities" within the reach of section 2(e). App. 15. The Ninth Circuit did not cite to any ruling from the FTC that applied the leased property exclusion; the FTC never has stated that such an exclusion exists.

The Ninth Circuit's cursory assessment of the FTC rulings ignores the common factor that binds all of the items on the list -- that all of those items serve to promote the resale of a commodity. Highway signs, restaurants, fuel lanes, showers and laundry at a truckstop are how truckstops conduct promotion, just as display cabinets in a department stores promote the sale of the goods being displayed. *See Simplicity Pattern*, 360 U.S. at 59-61 (wholesaler's provision of display cabinets to department stores but not to other resellers constitutes discriminatory provision of "facilities" in violation of section 2(e)). Without those truckstop facilities, the resale of fuel would be hindered.

Moreover, the Ninth Circuit's analysis fails on its own terms. Under that analysis, if items specifically included in the FTC regulations -- "advertising", "handbills", "cabinets" and "displays" -- are located on leased property, even those items would not constitute facilities within the reach of section 2(e).

In other words, if the Ninth Circuit's analysis is taken to its logical end, the Ninth Circuit would exclude as "facilities" items that the FTC explicitly has identified as facilities.

E. The Ninth Circuit's Opinion Allows a Franchisor to Evade the Language and Purpose of the Robinson-Patman Act.

The Ninth Circuit's opinion effectively gives any franchisor a means to avoid the language and purpose of the Act. Under the Ninth Circuit's opinion, any franchisor that leases property to a franchisee can avoid the Act.

This Court has stated that the purpose of the Act is to prevent price discrimination by wholesalers. *Falls City Industries v. Vanco Beverage,* 460 U.S. 428, 436 (1983). The specific purpose of sections 2(d) and 2(e) is to prevent disguised price discrimination in the form of disproportionate payments or provision of facilities by wholesalers to promote the sale of the wholesaler's commodities. *See F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 352 (1968) ("Congress chose to deter such indirect price discrimination by prohibiting the granting of sales promotional allowances to one customer unless accorded on proportionally equal terms to all competing customers"); *see also Simplicity Pattern,* 360 U.S. at 69-71 (discussing purpose of section 2(e)).

The application of the "leased property" exception in this case ignores the purpose of the Act. Unocal did not lease the real estate to Portland 76 because of the revenue that the lease would generate on its own. Unocal did not make improvements at the Northern California Unocal brand truckstops for investment reasons related to rental income; nor were those changes made pursuant to the leases Unocal had with those truckstop operators. Unocal did not make those improvements to obtain greater lease payments or to obtain

higher sales prices in the event the leased properties were sold. In fact, the rents that Unocal charged to Portland 76 and the Northern California truckstops did not bear a proportional relationship to the facilities Unocal provided to those truckstops. Instead, the real estate lease was a means of establishing a location through which Portland 76 could resell diesel fuel. In other words, the lease agreement existed so that fuel would be resold by Portland 76. Unocal did not just breach that lease; Unocal also discriminated against Portland 76 by not providing it with facilities -- *in addition to those required by the lease* -- that Unocal provided its other franchisees in addition to those required under their leases.

The Ninth Circuit's opinion in this case illustrates how easy it will become for a clever franchisor to evade the plain meaning and the stated purpose of the Act. If the Ninth Circuit's opinion is allowed to stand, section 2(e) may well become inapplicable to franchisor/franchisee relations. Clearly, that is not what Congress intended when it enacted the Robinson-Patman Act.

II. The Ninth Circuit's Analysis is in Conflict with This Court's Analysis -- and the Analyses Undertaken by Other Circuit Courts of Appeals -- In Interpreting and Applying the Undefined Terms Contained in the Robinson-Patman Act.

A. The Ninth Circuit's Opinion Creates A Conflict in Principle with its Own and the Second Circuit's Application of the Word "Facilities" as that Word is Used in Section 2(e) of the Act.

This Court should act to rectify a confusing and inconsistent body of law that has developed under section 2(e). The Ninth Circuit's opinion in this case is inconsistent with an earlier opinion from the Ninth Circuit interpreting and applying

section 2(e) of the Act, *Standard Oil Company of California v. Perkins*, 396 F.2d 809 (CA 9 1968), *reversed on other grounds*, 395 U.S. 642 (1969). In *Perkins*, the plaintiff, Perkins, brought, as pertinent, a Robinson-Patman Act claim against Standard Oil Company. At trial, Perkins was permitted to pursue his section 2(e) claim, based on the theory that the defendant failed to make "the same proportional payments and allowances to Perkins for such items as service station rest room maintenance, painting of service stations, advertising and credit card privileges" as the defendant did to other dealers. 396 F.2d at 814. Some of the gas stations at issue in that case were "leased premises" as that term is used by the Ninth Circuit in its opinion in this case. Simply put, in *Perkins*, the Ninth Circuit accepted that amenities to promote the sale of commodities which are placed on, or consist of, "leased premises" can be "facilities" under section 2(e) of the Act.

In this case, the Ninth Circuit unconvincingly attempted to distinguish its own decision in *Perkins*. The Ninth Circuit reasoned that *Perkins* was inapplicable here, because in *Perkins*, the "facilities" were leased from a third party and not from the fuel wholesaler. App. 9. That distinction is irrelevant. At no other juncture in the Ninth Circuit's opinion in this case does that fact that the "leased premises" are leased from a wholesaler, as opposed to some other third-party, play any role in the panel's analysis. Nor is that third-party/wholesaler distinction incorporated by the other circuits that have held that facilities located on leased premises are not "facilities" as that word is used in section 2(e). In fact, that distinction is in conflict with a recent Second Circuit opinion, *George Haug v. Rolls Royce Motor Cars*, 148 F.3d 136 (CA 2 1998).

In *Haug*, the plaintiff, an automobile parts and service provider, alleged that the defendant, an automobile wholesaler, had violated section 2(e) of the Act by discriminating in the

provision of various facilities, *including the rent the plaintiff had to pay* to the wholesaler. The plaintiff leased the premises from affiliates of the defendant wholesaler. *Id.* at 138-39. The Second Circuit reversed the trial court's dismissal of that claim.[4] *Id.* at 145. In reaching that conclusion, the Second Circuit discussed, in detail, the rent allegations regarding the "leased premises." *Id.* at 138, 145. It is apparent from *Haug* that, contrary to the Ninth Circuit's opinion in this case, "leased premises" and the amenities thereon, can be "facilities" under section 2(e).

B. The Ninth Circuit's Narrow Reading of the Text of the Robinson-Patman Act Contradicts This Court's and other Circuit Courts' Reading of that Text.

The Ninth Circuit's creation of an ambiguity in the text of the statute clearly falls outside of this Court's instructions regarding interpretation of a statute, discussed above. The Ninth Circuit's creation of an ambiguity also creates a conflict in principle with this Court's instructions regarding interpretation of terms contained in the Robinson-Patman Act.

This Court has twice held that the undefined terms in the Act need to be interpreted broadly to effectuate the purposes of the Act. *See Perkins* 395 U.S. at 647 (refusing to apply a narrow definition of the word "customer" as that word is used in section 2(a)); *Fred Meyer,* 390 U.S. at 352 (refusing to apply a narrow reading of the word "customer" as that word is used in section 2(d)). As the Court explained in *Perkins*, to read an undefined

---

[4] In *Haug*, the Second Circuit concluded that the rent allegations in the claim "are best construed as allegations of Section 2(d)." 148 F.3d at 145. However, the pertinent language in section 2(d) is identical to the language at issue in this case contained in section 2(e). Accordingly, the Second Circuit's interpretation of that language in *Haug* should govern here.

term in the act "narrowly would be wholly untenable when viewed in light of the purposes of the Robinson-Patman Act." 395 U.S. at 647. As with the limitation placed on the text of the statute by the Ninth Circuit in *Perkins*, the leased property limitation added to the Robinson-Patman Act by the Ninth Circuit in this case "is wholly an artificial one and is completely unwarranted by the language or purpose of the Act." *Id.*

The Ninth Circuit's approach in this case in narrowly interpreting the word "facilities" also is contrary to the approach taken by its sister circuits in interpreting and applying that same word. For example, in *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (CA 11 1990), the Eleventh Circuit addressed whether certain financing and promotional programs undertaken by a wholesaler were "services and facilities" within the ambit of section 2(e). That court concluded that the term "services and facilities" should be read broadly, and that "services and facilities" are things that "relate to the resale of the supplier's goods." 903 F.2d at 1424. That court then held that, whether a specific amenity or action was a service or facility under section 2(e), is a question of *fact* for the jury. *Id. See also Dantzler v. Dictograph Productions, Inc.*, 272 F.2d 172, 175-6 (CA 4 1959) (letter from wholesaler to potential customers on behalf of new distributor constituted furnishing of "services and facilities"). In contrast, in this case, the Ninth Circuit ruled that a jury determination regarding whether the facilities at the truckstop were "facilities" was outside of the jury's province.

In this case, the Ninth Circuit recognized that facilities at truckstops promote the resale of fuel. Nonetheless, the Ninth Circuit concluded, in contrast to the Eleventh Circuit in *Alan's of Atlanta*, that a non-textual narrow reading of the phrase "services and facilities" applied. That reading is misplaced, and creates a conflict in principle with the Eleventh Circuit.

The Ninth Circuit's narrow reading of the word "facilities" in this case also effectively narrows the word "purchasers" as that word is used in the statute. As was set forth at I.A, *supra*, the word "purchaser" applies to any person that purchases a commodity. However, the Ninth Circuit's opinion in this case limits those "purchasers" who may bring a section 2(e) claim only to "purchasers" that own the land on which they resell the commodity. By so doing, the Ninth Circuit limits the class of persons who may maintain a section 2(e) claim. That narrowing approach stands in stark contrast to this Court's broad interpretation of the word "customer" in both *Fred Meyer* and *Perkins*.

C. The Ninth Circuit's Narrow Reading and Application of the Legislative History of the Robinson-Patman Act Contradicts This Court's and Other Circuit Courts' Reading of that History and Inappropriately Narrows the Scope of the Act.

In this case, the Ninth Circuit applied the legislative history of the Robinson-Patman Act in a manner that flatly contradicts both this Court's and other Circuit Courts' application of that legislative history. Although the value or necessity of legislative history as an interpretive aid in this case is questionable, *see* I.C, *supra*, the Ninth Circuit's use of that history creates yet another conflict between it and other Circuit Courts of Appeal.

As was discussed above, the Ninth Circuit used legislative history in this case as a means of narrowing the scope of the Robinson-Patman Act. The Ninth Circuit concluded that, because this case did not involve the specific "evil" of "the 'Goliath' of 'huge chain stores sapping the life of local communities,' and oppressing both manufacturers and

independent realtors," the facilities at the truckstop were not facilities within the meaning of section 2(e). App. 11, 13. In other words, the Ninth Circuit basically concluded that, because the facts in this case were not identical to hypothetical facts presented in a floor debate in Congress in 1936, the Act did not apply. That use of legislative history to narrow the reach of the Act stands in contrast to both this Court's and other Circuit Courts' use of that history.

In *Falls City Industries*, this Court addressed the scope of one of the affirmative defenses contained in section 2(b) of the Robinson-Patman Act. In that opinion, this Court rejected the petitioner's argument that the Act only should be applied in cases involving large buyer preference or seller predation. This Court explained:

> "Although concerns about the excessive market power of large purchasers were primarily responsible for passage of the Robinson-Patman Act, the Act is of general applicability and prohibits discriminations generally. The determination whether to alter the scope of the Act must be made by Congress, not this Court . . ."

460 U.S. 436 (citations omitted; internal quotation marks omitted). In *Falls City Industries*, this Court explicitly stated that the legislative history of the Act must be read to give broad meaning to the provisions of the Act. The legislative history of the Act compels an inclusionary approach to the text of the Act, not the exclusionary approach taken by the Ninth Circuit in this case.

Numerous circuits have adopted that broad reading of the history of the Act when applying the Act's provisions. In *Alan's of Atlanta*, the Eleventh Circuit discussed the history of

the Act before it held that financial and promotional programs could be "services and facilities." 903 F.2d at 1422-23. Similarly, in *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1532 (CA 3 1990), *cert. denied*, 499 U.S. 921 (1991), the Third Circuit concluded that the legislative history of the Act supported an interpretation that resulted in a "wide breadth of protection afforded by the Act." Until this case, even when the Ninth Circuit turned to the legislative history of the Robinson-Patman Act as an interpretive aid, it rejected those readings of the act that would narrow its scope. *See, e.g., Chroma Lighting v. GTE Products Corp.*, 111 F.3d 653, 656-57 (CA 9) (rejecting a reading of the legislative history of the Robinson-Patman Act that would narrow the scope of the Act), *cert. denied*, ____ U.S. ____, 118 S. Ct. 357 (1997); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1446 (CA 9) (same), *cert. denied*, 516 U.S. 987 (1995).

This Court has read the legislative history of the Robinson-Patman Act to prevent "discriminations generally" and not merely to prevent discrimination between 1930s chain stores and independent resellers. Numerous circuits have adopted and applied that reading of the history of the Act to the cases that they have considered. The Ninth Circuit's opinion in this case stands in stark contrast to those opinions. If legislative history is relevant in this case, the Ninth Circuit has misapplied it in an inappropriate narrowing fashion.

III. The Ninth Circuit's Opinion Illustrates the Need for Guidance From This Court in Interpreting Section 2(e) of the Robinson-Patman Act.

In 1936, when the Robinson-Patman Act was passed by Congress and signed into law, few legislators would have been able to predict the sweeping changes that would affect the economy -- and wholesaler/distributor relations -- in the

intervening sixty years. As this case illustrates, courts, businesses and litigants are struggling to understand and apply the Act in the current business environment. Guidance is needed from this Court to define and delineate the application of the Act in these times.

Chain stores no longer are the only big players in the marketplace. Franchises of all sorts now dominate the economic landscape. The franchisee has come to replace the "mom and pop" independent reseller of the 1930s.

Land rights and land ownership also have become increasingly complex. The era of a small business people and merchants possessing a fee-simple interest in the land on which their shops rest is long past.

The Ninth Circuit's opinion in this case places the Robinson-Patman Act in a time capsule. The opinion ignores the changes that have occurred. It treats the Act as stagnant and denies the applicability of the Act to the modern era. The Ninth Circuit achieves that result by ignoring the plain meaning of the statute and this Court's (and other Circuit Courts') instructions on how that language should be interpreted.

On only one occasion has this Court interpreted and applied the provisions of section 2(e) of the Robinson-Patman Act. In that case, *Simplicity Pattern*, this Court did not address the meaning of the word "facilities" as that word is used in section 2(e). Although this Court has interpreted other provisions of the Robinson-Patman Act, including sections 2(b) and 2(d), which also contain the phrase "services or facilities," this Court never has interpreted that phrase.

It is time for this Court to look again at section 2(e) of the Robinson-Patman Act. At least three circuits improperly have added a non-textual exception to that section of the Act for

facilities located on leased property. Unless this Court steps in and corrects that mistake, those holdings will remain the unchecked majority rule. Finally, the circuits appear to be split as to how to apply the applicable legislative history to the language of the Act.

Without guidance from this Court, the circuits will continue to eviscerate the Robinson-Patman Act. Similarly, the circuits will produce inconsistent applications of the history of that Act to reach conflicting and inconsistent results. For the foregoing reasons, review in this Court of the Ninth Circuit's opinion in this case is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bruce M. Hall*
John J. Dunbar
Sarah J. Ryan
BALL JANIK LLP
101 S.W. Main, Suite 1100
Portland, OR 97204
Telephone: (503) 228-2525
Counsel for Petitioner
Portland 76 Auto/Truck Plaza, Inc.
**Counsel of Record for Petitioner*